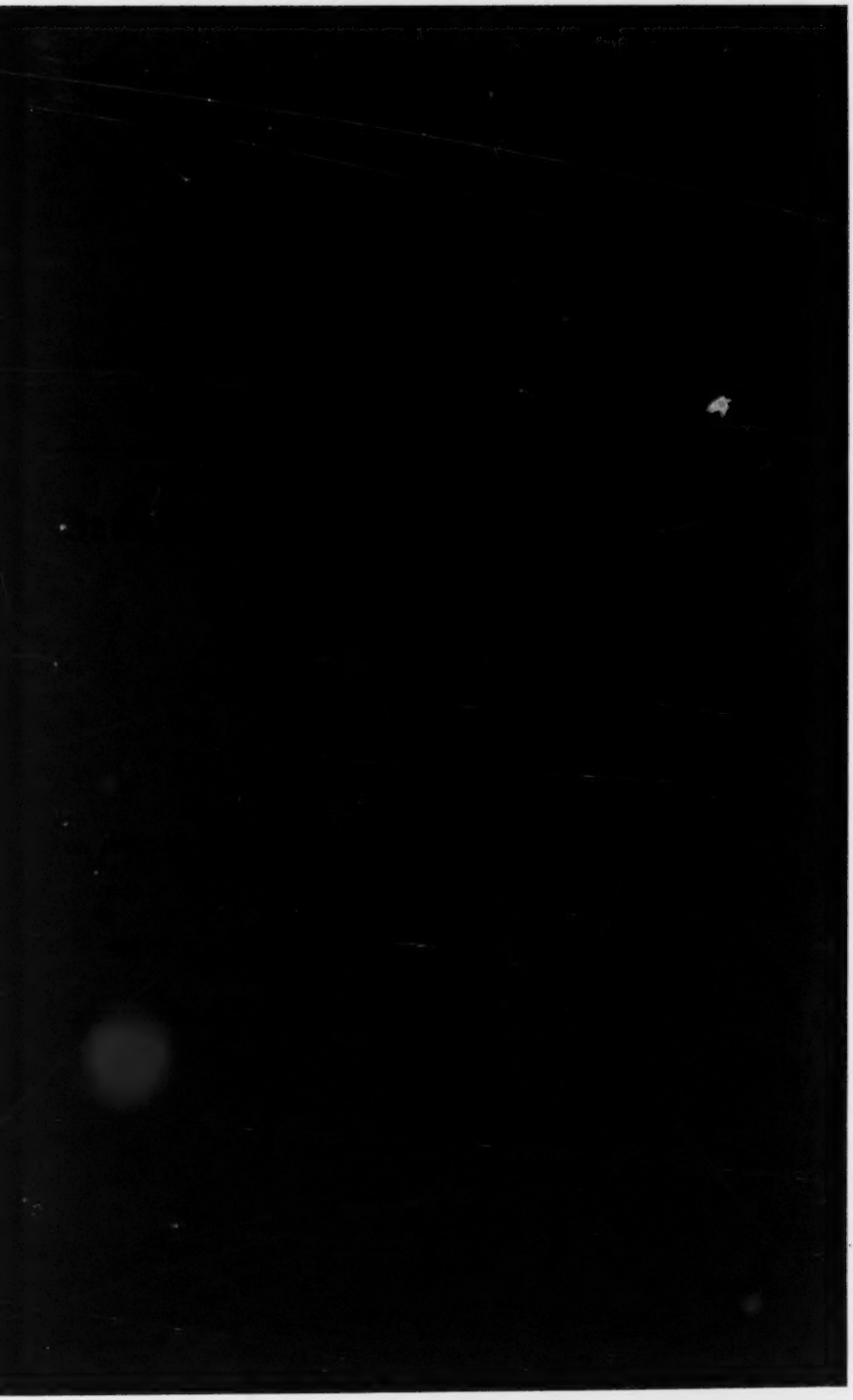
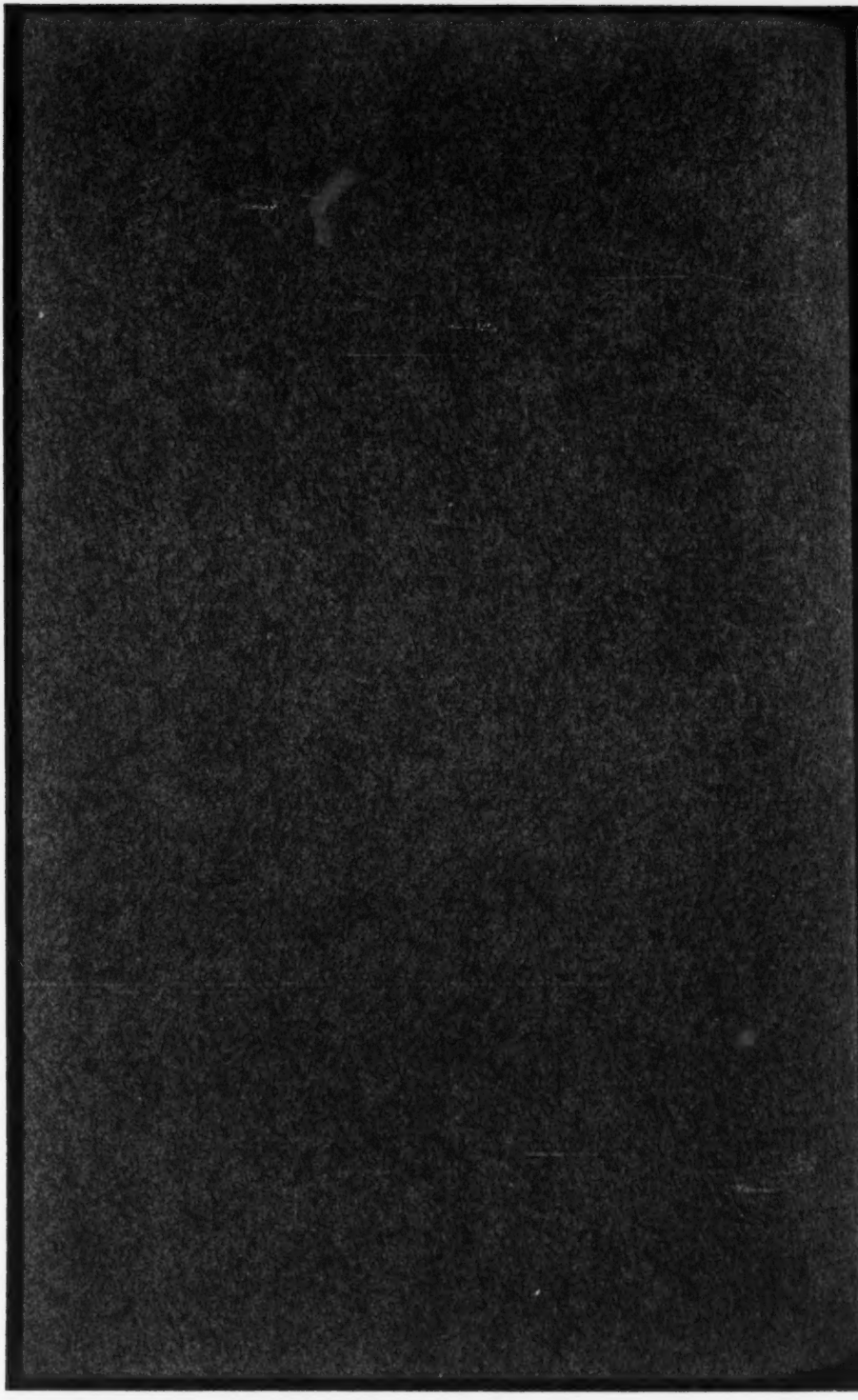




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# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 169

RICHARD W. LECHE, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1099–1101) is reported in 118 F. (2d) 246. The opinion of the District Court overruling the demurrer to the indictment (R. 35–50) is reported in 34 F. Supp. 982.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 13, 1941 (R. 1101); a petition for rehearing was denied May 9, 1941 (R. 1145). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

1. Whether the trial court, by instructing the jury to disregard as surplusage an allegation in the indictment that the scheme to defraud involved a violation of the laws of the State of Louisiana, altered the indictment so fundamentally that it was error to submit the case to the jury; and whether the indictment, in the light of the instructions, charged a scheme to defraud.

2. Whether the evidence was sufficient to establish that the mailings alleged in the indictment were for the purpose of executing the scheme to defraud.

3. Whether the indictment, charging a general scheme to defraud, is rendered duplicitous by allegations particularly describing two transactions carried out as a part of the general scheme.

4. Whether petitioner was denied a fair trial by rulings restricting cross-examination of prosecution witnesses or by alleged misconduct of prosecuting attorneys.

## STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Criminal Code § 215; 18 U. S. C. § 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representa-

> tions, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States * * *, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

**STATEMENT**

Petitioner was convicted (R. 74) in the United States District Court for the Western District of Louisiana on all three counts of an indictment charging that petitioner, together with one L. P. Abernathy and one George B. Younger, made use of the United States mails in the execution of a scheme to defraud (R. 1–16). Abernathy and Younger entered pleas of guilty (R. 56). Petitioner proceeded to trial and upon conviction was sentenced to 5 years' imprisonment on the first count and 5 years on the second count, the sentences to run consecutively.[1] Imposition of sentence on the third count was suspended, and the de-

[1] At the conclusion of petitioner's trial, Abernathy was sentenced to pay a fine of $1,000 on Count 1. Imposition of sentence on the remaining counts was suspended and Abernathy was placed on probation for five years. Younger was sentenced to pay a fine of $1,000 on each of the three counts of the indictment (R. 68).

fendant placed on probation (R. 74–75). The Circuit Court of Appeals for the Fifth Circuit affirmed the conviction (R. 1101).

The case proved under the indictment may be summarized as follows:

In May 1936, petitioner became Governor of the State of Louisiana (R. 613). One James Thomas, a sales agent for various companies doing business with the State and with contractors working for the State (R. 430–433), contributed heavily to Leche's election campaign and also to the successful campaign for the passage of a State constitutional amendment appropriating $500,000 for the purchase of trucks and equipment for the Louisiana Highway Commission (R. 395–396, 470, 473). The defendant Abernathy, a close friend of Thomas, was appointed by petitioner as chairman of the Highway Commission (R. 94, 435–436, 674–678).

Sometime prior to August 1937, in the course of conversations between petitioner and Thomas regarding the purchase of trucks by the Highway Commission, Thomas informed petitioner that the defendant Younger, a dealer in International trucks, would be willing to pay a "commission" (R. 399). Petitioner told Abernathy not to make any purchase until he should instruct Abernathy on the matter (R. 673–674). Early in August 1937, petitioner, Abernathy, and Thomas met to discuss the number of trucks to be purchased and where the business should be placed (R. 398, 672, 685–686).

Petitioner instructed Abernathy to purchase 12 of the 150 trucks from one James Buie and the balance "through Mr. Thomas from the Younger Motor Truck Company" (R. 685–686). As they were leaving the office, Thomas asked petitioner what he should do with the commission he was to receive from Younger, and petitioner replied "I will tell you when you get it" (R. 399).

The 138 trucks were delivered to the Highway Commission over a period from September 27, 1937, through October 8, 1937 (Ex. G–17, R. 845–862). Under date of October 5, 1937, the Younger Motor Truck Company rendered an invoice to the Commission for the purchase price in the aggregate amount of $227,173.54 (Ex. G–16, R. 842–844). Upon instructions from Abernathy, after all of the trucks had been delivered, the State Highway Maintenance Engineer and the Highway Commission Purchasing Agent prepared a formal requisition and a purchase order, the necessary data being copied from Younger's invoice of October 5, 1937 (R. 161, 234–235, Ex. G–14 and G–15, R. 837–841). These officials, as well as other employees and members of the Highway Commission including two whose signatures appeared on the checks issued to the Younger Motor Truck Company, testified that they knew nothing of the merits of the purchase (R. 164, 217–218, 238, 242–244). The purchase had never been discussed at a Commission meeting nor had the Commission adopted any resolution authorizing the

purchase (R. 242, 245). Three Highway Commission checks totalling $227,173.54 were issued to the Younger Motor Truck Company on October 13, 1937. Younger endorsed them in the office of the Highway Commission auditor, who mailed them to Younger's bank. This mailing is the basis of Count 1 of the indictment (R. 9, 203–204, Ex. G–19, R. 865–870).

In July or August, 1938, petitioner Abernathy and Thomas met once more in Abernathy's office to discuss additional equipment requirements of the Highway Commission (R. 412–414), and Thomas thereafter transmitted to Younger an order for 95 more trucks. As on the earlier occasion, the requisition and purchase order were prepared after the trucks had been delivered and on the basis of an invoice presented by Younger (R. 162–163, Exs. G–25, G–26, and G–27, R. 879–884). In payment for the trucks the Highway Commission issued a warrant in the amount of $170,158.51 dated September 16, 1938, payable December 31, 1938, and bearing interest at the rate of 4 per cent (Ex. G–30, R. 953). Younger sold the warrant on the day he received it (R. 293–298). Due to a shortage of funds in the Highway Commission accounts the warrant was not, however, redeemed until January 26, 1939 (R. 208).

Excluding such items as freight and handling cost, the net amount paid by the Highway Commission to Younger for the 233 trucks was $385,152.54 (R. 127–128). The retail list price of these

trucks amounted to $352,306.25 (R. 152). Thus the Highway Commission paid $32,846.29 (9.32 per cent) more than the retail list price (R. 152–153). Younger's profit on the two transactions totalled $116,571.88, including $6,139.11 in State sales taxes collected from the Highway Commission, but not paid to the State [2] (R. 112, 119–120). There was testimony that it was the policy of the International Harvester Company, the manufacturer of the trucks, to sell to governmental units at dealer's discounts ranging from 10 to 35 per cent (R. 347). It was also testified that pursuant to a well understood company policy, dealers would allow to governmental units discounts from the retail list price ranging from 10 to 15 per cent (R. 348–349).

On October 13, 1937, when Younger received the Highway Commission checks for $227,173.54, he issued a check to James Thomas in the amount of $31,000 as "commission" on the sale (R. 116, 399, 400, Ex. G–35, R. 960). Similarly, on September 17, 1938, the day following the issuance of the $170,-158.51 Highway Commission warrant in payment for the 95 trucks, Younger issued to Thomas a sight draft for $22,000 as "commission" on the 1938 sale (R. 121, 400, Ex. G–43, R. 971). Thomas deposited these commissions in his own bank account, but testified that he held the $53,000 so

[2] Younger started payments in installments on the 1938 tax of $1,684.73 on August 21, 1939, after a State tax audit (R. 120).

received "as a trust" for petitioner (R. 495). Upon instructions from petitioner he included this amount in his own income tax returns (R. 402, 443, 444, 454, 455). Out of this $53,000 fund Thomas paid over to petitioner $31,000 in cash (R. 401–402). Thomas delivered the money in three installments, each wrapped in manila wrapping paper, to petitioner at his office in the Governor's mansion with no other person present (R. 416–417). The balance of the $53,000 was paid over by Thomas from time to time pursuant to instructions from petitioner, chiefly to political creditors of petitioner (R. 403–408, 502–505, 507–528, 533–536).

## ARGUMENT

### I

1. Petitioner contends (Pet. 11–20) that the trial court erred in submitting the case to the jury after instructing it to disregard, as surplusage, the allegation in the indictment that it was "a further part" of the scheme that the defendants would not comply with the Louisiana law requiring competitive bidding on State purchases of materials and supplies (R. 6, 767, 779–780). That action, in petitioner's view, removed from the jury's consideration an "essential element" of the scheme charged and subjected him to conviction for a crime not alleged in the indictment (Pet. 11–12, 14–15, 20).

However, the violation *vel non* of the Louisiana statute was in no sense an essential element of the

scheme charged. While the indictment alleged the scheme in great particularity (R. 1–8), in essence the crime charged was that, in violation of his official trust as Governor, petitioner, in connivance with Abernathy, the Chairman of the State Highway Commission, and Younger, a motor truck dealer, caused the Commission to buy a large number of trucks at excessive prices for the purpose of deriving an exorbitant profit which would be covertly shared by Younger, the dealer, petitioner, and his intermediary, Thomas. This scheme, as is apparent from the summary of the evidence at pp. 4–8, *supra,* was abundantly proved. Such a scheme, whether effectuated by failure to invite bids or otherwise, falls within the well-recognized category of frauds covered by the Mail Fraud Statute where one in a position of trust, public or private, derives a secret profit from his fiduciary relationship at the expense of those whom he is supposed to serve. *United States* v. *Buckner,* 108 F. (2d) 921, 926–927 (C. C. A. 2d), certiorari denied, 309 U. S. 669; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5th), certiorari denied, May 12, 1941, Nos. 910–913, last Term.[3] Since, as is apparent from a reading of the indictment, the failure to comply with the competitive bidding statute was merely an incidental step in the scheme alleged, the action of the trial court in removing the

[3] For a more exhaustive exposition of the controlling theory see pages 14–16 of the Government's brief in opposition in the *Shushan* case, Nos. 910–913, last Term.

inapplicable state statute from the jury sideration was of no consequence.[4]

2. Petitioner further insists that the ourt by the instructions in question withdrew the jury the only two false representations d in the indictment (R. 7–8) because, he asit is apparent from the indictment that their was dependent upon a requirement under law that there be competitive bidding (P 19). Petitioner does not in terms argue false representations are an indispensable ment of a scheme to defraud (cf. *Shushan nited States, supra*), but relies upon the sup fact that this indictment was built upon the presentations in question. However, it is that the misrepresentations were but a min dent in the perpetration of the principal fr eged here.

Moreover, the trial court did not draw the allegations as to misrepresentations. sub stance of the misrepresentations charge that the defendants fraudulently asserted b ns of invoices the existence of an indebtedness than that which was legally due. It is only y of explanation that the indictment then hat a smaller sum was due "because it was app ately the amount that the manufacturers said

[4] The power of a court to instruct the jury egard immaterial allegations is unquestioned. *Ha nited States*, 112 F. (2d) 128 (C. C. A. 5th), cert enied, 311 U. S. 684, 722; cf. *Hall* v. *United States*, S. 632, 639.

trucks and equipment would have, without the interference of the said defendants, sold the motor-trucks and equipment to the Louisiana Highway Commission under legal and competitive bids and contracts" (R. 7). This allegation, that competitive bidding would have resulted in better prices for the State, was amply supported by evidence, unrelated to the Louisiana bidding laws (R. 344–349, 368–370, 382–386), which the trial court instructed the jury to consider in determining whether the trucks could have been purchased more cheaply "if an effort had been made" (R. 777).

3. Petitioner further asserts that the elimination of the Louisiana bidding statutes from the case leaves his conviction resting solely upon his failure to exercise "discretion" or "business prudence", relying in this connection upon isolated extracts from the opinion of the Circuit Court of Appeals and the trial court's charge to the jury. He argues that there can be no scheme to defraud without deceit (Pet. 12–15). The short answer to petitioner's contention is that his conviction did not rest upon any innocent failure to exercise business prudence. The trial court specifically charged that "deliberate purpose" and "guilty knowledge and participation" were required (R. 764), and that (R. 773):

> Carelessness alone, or inattention to business, would not be sufficient upon which to base a verdict of guilty, and you must be convinced beyond a reasonable doubt that he [petitioner] did so participate and did

> have such an interest in the matter as the Government contends. * * *

Petitioner was apparently satisfied with the fairness of these instructions, since he did not object to them or request any additional charge.

## II

1. Petitioner contends (Pet. 20–21) that the letter and voucher checks set forth in count one (R. 9–12) were not mailed in the execution of the scheme to defraud. The letter in question was a letter from the Highway Commission Auditor to Younger's bank transmitting the three checks issued by the Commission in payment for the first auto trucks. The checks were credited to Younger's account by the bank (R. 201, 203–204, Exs. G. 18 and G. 19, R. 863–870, 876–877). It was from this account that Younger paid the "commissions" to Thomas, who in turn made distribution to petitioner and his nominees (R. 116, 399–408, Exs. G. 24, R. 877, G. 34, R. 959).

It is clear that the forwarding of the checks was an important step in the transmission of the fruits of the fraud to those who were to benefit therefrom. It is wholly immaterial whether the mailing of the checks was also, as petitioner insists (Pet. 20–21), in pursuance of some agreement which Younger had with his bank. The issue, viewed most favorably to petitioner, was one of fact upon which the jury found against petitioner under the instruc-

tions given at his request that "the mailed matter * * * must be a step in the attempted execution of the scheme" (R. 774, 776). *Green* v. *United States,* 93 F. (2d) 537, 539 (C. C. A. 10th).

2. Petitioner also contends (Pet. 21–24) that the mailing alleged in the second count of the indictment (R. 13–14) was not in furtherance of the scheme, because the scheme had then terminated. This mailing occurred in the clearance of the $22,000 sight draft drawn on the Guaranty Bank of Alexandria, which Younger gave Thomas as "commission" on the second truck deal. After Thomas deposited this draft in his account at the City National Bank of Baton Rouge (Exhibit G–44, R. 972) the bank forwarded the check for collection to the Commercial National Bank of Shreveport, which in turn mailed it to the Rapides Bank and Trust Company in Alexandria (R. 319, 322, 335–336). The last-named bank collected from the drawee bank by messenger (R. 315, 336).

As has already been noted, Thomas was the intermediary through whom a portion of the proceeds of the fraud was distributed to petitioner. It is plain that the clearance of the draft was intimately connected with the distribution of the fraudulent proceeds, and until that distribution was accomplished the scheme cannot be said to have terminated. *Tincher* v. *United States,* 11 F. (2d) 18, 21 (C. C. A. 4th), certiorari denied, 271 U. S. 664; cf. *McDonald* v. *United States,* 89 F. (2d) 128,

133–134 (C. C. A. 8th), certiorari denied, 301 U. S. 697.[5]

Moreover, the Louisiana Highway Commission (R. 2) was not finally defrauded until the $170,158.51 Highway Commission warrant issued in payment of the second group of trucks was redeemed and this amount charged against the Commission's bank account. *Hart* v. *United States, supra,* at page 131; Cf. *Meyer* v. *United States,* 220 Fed. 800, 804–805 (C. C. A. 9th). This did not occur until January 27, 1939, approximately four months after the mailing of the $22,000 draft (Exs. G–51 to G–56, R. 981–986).

3. Petitioner argues (Pet. 23–24) that the deposit of the $22,000 sight draft by Thomas in the City National Bank, which thereupon credited his account, relieved the defendants of responsibility for the subsequent mailing of the check for collection, because in collecting it the bank acted as "owner" rather than as agent for Thomas. But the issue in a mail fraud prosecution is whether the defendants "caused" the mails to be used, and any reasonably foreseeable use of the mails which results from the operation of the scheme is sufficient under the statute. *Hart* v. *United States,*

[5] *Mitchell* v. *United States,* 118 F. (2d) 653 (C. C. A. 10th), and *Dyhre* v. *Hudspeth,* 106 F. (2d) 286 (C. C. A. 10th), cited by petitioner to show a conflict of decisions (Pet. 11, 23), involved no question of division of proceeds, necessary to complete the scheme. The remaining cases cited at this point in the petition relate to sufficiency of proof of mailing, which is discussed at p. 15, *infra.*

*supra,* at page 131; *United States* v. *Weisman,* 83 F. (2d) 470, 473 (C. C. A. 2d), certiorari denied, 299 U. S. 560; *Shea* v. *United States,* 251 Fed. 440, 448 (C. C. A. 6th), certiorari denied, 248 U. S. 581. It is clear that a man of Thomas' business experience would reasonably anticipate that the deposit of an out-of-town draft would be likely to result in its clearance through the mails.

4. Petitioner asserts that there was no proof of mailing under the second count (Pet. 25). However, there was abundant testimony by the employees of both the sending and receiving banks that the uniform practice of the two banks was to transmit items such as the drafts set forth in counts two and three through the United States mails (R. 321–324, 328–329, 340–341). In addition, witnesses employed in the transit departments of the banks testified unequivocally that these items had been received and dispatched through the mails (R. 319, 335–338). This evidence was called to the attention of the jury in the District Court's charge (R. 768–772), and there can be no question of its sufficiency.[6] In none of the cases cited by petitioner (Pet. 25) was

[6] See *Greenbaum* v. *United States,* 80 F. (2d) 113, 124–125 (C. C. A. 9th); *McIntyre* v. *United States,* 49 F. (2d) 769 (C. C. A. 6th); *United States* v. *McCann,* 32 F. (2d) 540, 541 (C. C. A. 2d), certiorari denied 280 U. S. 559; *Cochran* v. *United States,* 41 F. (2d) 193, 205 (C. C. A. 8th); *Havener* v. *United States,* 49 F. (2d) 196, 200 (C. C. A. 10th), certiorari denied 284 U. S. 644.

there the volume of testimony of mailing found in the present case.

III

The indictment was not duplicitous. Petitioner's contention to the contrary (Pet. 26–28) is based on the allegations particularly describing the two truck deals effected by the defendants. But the indictment (R. 1–8) charges that these deals were carried out as part of a single general scheme to defraud, that each purchase of trucks was made from the same company, that each transaction involved the payment of similarly excessive prices by the Louisiana Highway Commission and distribution of spoils through the Younger Motor Truck Company, and that the profit from the two sales was treated as a single fund. It is well settled that such allegations charge a single scheme. *Sconyers* v. *United States,* 54 F. (2d) 68, 69 (C. C. A. 5th) *Van Riper* v. *United States,* 13 F. (2d) 961, 964 (C. C. A. 2d); *Stumbo* v. *United States,* 90 F. (2d) 828, 832 (C. C. A. 6th); certiorari denied 302 U. S. 755.

*United States* v. *Siebricht,* 59 F. (2d) 976 (C. C. A. 2d), relied on by petitioner (Pet. 11, 27), actually held that the indictment in that case charged a single scheme. The conviction was reversed, however, on the ground that the proof established two separate schemes, one of which was barred by the

statute of limitations.[7] In the instant case, the evidence fully supported the theory of the indictment that there was a single integrated scheme to defraud. It was proved that the parties to both transactions were the same; that the money to pay for the trucks came in both instances from a common source; that the method of operation was identical in both transactions. Indeed, when Thomas gave Younger the 1938 order he did not even give him a memorandum of specifications, as on the 1937 purchase, but simply told him "to just furnish so many trucks the same as previously" (R. 467). The pattern of the scheme had been established. Further transactions followed the pattern.

## IV

1. Petitioner complains that it was improper to call the witness Hill to contradict certain testimony given by petitioner on cross-examination (Pet. 29–30). Petitioner had testified as to his participation with Hill in an oil and gas syndicate which paid petitioner, while Governor, $189,000,

[7] The holding that the evidence established two schemes seems hard to justify, and subsequent decisions of the Circuit Court of Appeals for the Second Circuit show that plurality of transactions does not mean plurality of schemes, given a nucleus of common participants, reasonable continuity, and similarity of objectives and methods of operation. *United States* v. *Manton*, 107 F. (2d) 834, 838 (C. C. A. 2d), certiorari denied 309 U. S. 664; *United States* v. *Graham*, 102 F. (2d) 436, 443–444 (C. C. A. 2d), certiorari denied 307 U. S. 643.

mostly in cash, in the course of three years (R. 622–632). Although petitioner claimed that these payments were for legitimate private business services, it appeared that he had made no investment in this enterprise and that his name was not shown on the company's books (R. 621, 649). Hill was called as a Government witness to explain the true nature of the payments to petitioner, but claimed his privilege against self-incrimination and did not testify (R. 689). The Government sought to establish through Hill evidence of "other similar transactions" bearing upon the issue of the fraudulent intent in the transactions charged in the indictment.[8] Accordingly, this was not a "collateral" matter, as petitioner urges, but a fundamental issue in the case and properly the subject of rebuttal testimony. *Scott* v. *United States*, 172 U. S. 343, 345–348; *Tam Shi Yan* v. *United States*, 224 Fed. 422, 423 (C. C. A. 2d); *Strom* v. *United States*, 12 F. (2d) 233, 234 (C. C. A. 6th), certiorari denied, 271 U. S. 683. Even if the subject matter were collateral, the admission of rebuttal testimony could hardly constitute reversible error, for the rule barring such contradiction rests on the policy against prolongation of trials by the injection of

[8] Although, as petitioner states (Pet. 29), the trial court ruled at the conclusion of the Government's case in chief that there was no similarity between the two transactions (R. 603–608), the record shows that he ultimately came to the view that the Hill arrangement was a similar transaction and therefore was material to the Government's case and subject to rebuttal (R. 689).

extraneous issues—a consideration which would seem to be properly left to the trial court's discretion. See *Hall* v. *United States,* 277 Fed. 19 (C. C. A. 8th); *Wharton,* Criminal Evidence, 11th Ed., Vol. III, Sec. 1354.

The prosecutor in closing argument should doubtless have made no reference to Hill's refusal to testify (R. 722). But petitioner did not object to these remarks when they were made and did not ask for any instruction requiring the jury to disregard them. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238–239. Even where prosecutors have commented regarding a claim of privilege made by a defendant convictions have been sustained if the trial court took prompt remedial measures or, if no objection has been made, where guilt is clearly established. *Cross* v. *United States,* 68 F. (2d) 366 (C. C. A. 5th); *Nobile* v. *United States,* 284 Fed. 253, 255–256 (C. C. A. 3d).

2. Error is also urged (Pet. 30–32) because of the cross-examination of petitioner upon the assumption that a $14,030.90 item in his income-tax return was a gain, whereas it was actually a loss (R. 633–634). The incident was plainly unintentional and certainly not prejudicial. The prosecutor, having only a photostatic copy of the income tax return on which red ink loss figures could not be distinguished from black ink gain figures, assumed that the item was income.[9] And although

[9] Petitioner's assertion that Government counsel had the original return in his possession (Pet. 31) is contrary to fact.

the return and accompanying schedules were shown to the petitioner in the course of the examination (R. 633–634) and were available to his counsel, no one discovered the error until after the trial. The inquiry was directed simply to one figure among many others in petitioner's income-tax returns which the prosecutor was exploring in order to discover whether the returns reflected the income derived from the truck transactions. The prosecutor, assuming the item to represent income, was naturally surprised to have the taxpayer express ignorance of the source of such a large item, and, on the basis of the facts as he understood them, properly pointed to this circumstance as reflecting upon the credibility of the defendant.

3. There is clearly no error in the trial court's refusal to permit petitioner's counsel to cross-examine Thomas for the purpose of bringing out what petitioner had told Thomas that he intended to do with the "commission" on the truck deal. It would make no difference whether Leche intended to use this money for political or personal purposes.

Petitioner also finds "quite incomprehensible" (Pet. 34) the trial court's ruling restricting cross-examination of Government witness Abernathy to matters covered on direct examination (R. 682–683). It is plain, however, that this ruling but conforms to the well-established rule on this subject in the Federal courts. *Aplin* v. *United States*, 41 F. (2d) 495, 496 (C. C. A. 9); *Rose* v. *United States*,

45 F. (2d) 459, 465 (C. C. A. 8); *Feener* v. *United States,* 249 Fed. 425, 427 (C. C. A. 1).

4. Petitioner cannot show reversible error upon improper remarks of Government counsel in their summations to the jury (Pet. 35–36). In the first place, the record contains only a portion of the speech made by petitioner's counsel (R. 1083), but from that portion which does appear it may be assumed that the provocation was great.[10] The subsequent arguments of Government counsel are by no means models of temperate reasoning, but it is clear that much of the heat was generated by the attacks upon the prosecutors by defense counsel (R. 749–750, 1080). An appellate court will not reverse a conviction in the absence of a record of the defense argument, from which the extent of provocation for the prosecutor's remarks may be determined. *Vause* v. *United States,* 53 F. (2d) 346, 354 (C. C. A. 2d), certiorari denied, 284 U. S. 661; *Murphy* v. *United States,* 39 F. (2d) 412, 414 (C. C. A. 8th); *Hoffman* v. *United States,* 20 F. (2d) 328, 329 (C. C. A. 8th). Moreover, it is settled that where the evidence of guilt is strong and convincing, as in the instant case, argument of counsel, even if improper, will not be held to have

[10] The principal prosecution witness was characterized as an "evil bat" and "dirty package" (R. 1092), an attempt was made to provoke sectional prejudice by referring to the Assistant Attorney General who led the prosecution, as coming "down here from Chicago" (R. 1095; cf. R. 97, 113) and the Government's evidence was referred to as a "heap of rubbish" (R. 1089).

substantially prejudiced the defendant's rights. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240; *Berger* v. *United States*, 295 U. S. 78, 89.

## CONCLUSION

The decision below is clearly correct, and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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